STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION, a licensed Michigan insurer,

Plaintiff-Appellee,

v

JOSEPH DANIEL HALL,

Defendant,

and

FARMERS INSURANCE EXCHANGE, a licensed Michigan insurer

Defendant-Appellant.

UNPUBLISHED
August 2, 2005

No. 254914
Lenawee Circuit Court
LC No. 02-001047-CK

BRANDON MICHAEL LAWRENCE,

Plaintiff-Appellee,

v

CAROL ANN MARTINEZ,

Defendant-Appellee,

and

FARMERS INSURANCE EXCHANGE, a licensed Michigan insurer,

Appellant.

No. 254943
Lenawee Circuit Court
LC No. 02-000727-NI

AUTO CLUB INSURANCE ASSOCIATION, a licensed Michigan insurer

Plaintiff-Appellee,

v

CAROL ANN MARTINEZ,

Defendant-Appellee,

and

FARMERS INSURANCE EXCHANGE, a licensed Michigan insurer,

Appellant.

No. 254944
Lenawee Circuit Court
LC No. 03-001156-CK

BRANDON MICHAEL LAWRENCE,

Plaintiff-Appellant,

v

CAROL ANN MARTINEZ,

Defendant-Appellee.

No. 256402
Lenawee Circuit Court
LC No. 02-000727-NI

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In these consolidated cases, defendant Farmers Insurance Exchange appeals as of right the March 2004, trial court order granting plaintiff Auto Club Insurance Association's motion for summary disposition under MCR 2.116(C)(10). In addition, plaintiff Lawrence appeals as of right both the trial court order granting defendant Martinez summary disposition and the order granting defendant Martinez and previous defendant, Todd Frederick's motion for sanctions and cost under MCL 600.2591. Further, plaintiff Lawrence appeals as of right the trial court decision to set aside a default and its failure to enter a default against defendant Martinez under MCR 2.603.

I. FACTS

On February 24, 1998, Carol Martinez's 14-year-old son Matthew drove Carol's 1993 Hyundai when she was not home. Matthew picked up Brandon Lawrence, Jesse Hall and 14-

year-old Joseph Hall and permitted Joseph Hall to drive the vehicle. While driving, Joseph Hall lost control of the vehicle and hit a tree. Matthew Martinez, the right front passenger, died and the three other boys were seriously injured.

Defendant stated in her deposition that on the accident date, she left her home early in the morning on a bus and left the keys to her vehicle on her kitchen table. She had told Matthew that his older brother could drive it to McDonald's that evening. She did not forbid Matthew from taking the vehicle or discuss it with him since he had never taken the vehicle before to her knowledge.

In docket #254914, two automobile insurers, Farmers Insurance Exchange (Farmers) and Auto Club Insurance Association (Auto Club) argue over which company should pay costs incurred in defending Joseph Hall, the driver of the vehicle in a lawsuit brought by surviving victim Brandon Lawrence on March 26, 2002. Farmers insured defendant's car through a policy issued to Todd Frederick, Carol Martinez's former son-in-law. Auto Club insured Pauline Hall, mother of the driver Joseph Hall.

Farmers refused to defend Joseph Hall, arguing that the Lenawee County Sheriff's Department report and statements taken under oath of Carol Martinez and Joseph Hall proved that Joseph Hall was driving without the permission of Carol Martinez. The Farmers policy specifically precluded coverage where the driver of the vehicle did not have permission to operate the vehicle. Auto Club initially covered Joseph Hall's costs. However, after a discovery period, Auto Club filed a complaint for declaratory judgment arguing that its policy issued to Pauline Hall did not provide coverage to Joseph Hall and that Farmers had a duty to defend Joseph Hall. Auto Club and Farmers both filed motions for summary disposition arguing that their policies did not provide coverage to Joseph Hall.

In March 2004, the trial court granted summary disposition in favor of Auto Club and Farmers. The court found that Joseph Hall had operated the vehicle without permission, thus, neither Auto Club nor Farmers were required by their policies to defend Joseph Hall.

Auto Club then sought reimbursement from Farmers for one-half of the defense costs it had already incurred. The trial court concluded that Farmers had a duty to defend Joseph Hall until it conclusively established that its policy did not provide coverage. The court ordered Farmers to reimburse Auto Club for one-half of the defense costs incurred prior to the March, 2004 grant of summary disposition which Farmers now appeals.

In Docket #256402, the suit that gave rise to the dispute between the two insurance companies, Brandon Lawrence (plaintiff) brought suit against Carol Martinez and Todd Frederick (defendants), as well as Pauline Hall, individually and as guardian of Joseph Hall, and Joseph Hall individually. The Halls are not parties to this appeal.

Defendant Martinez initially did not defend the lawsuit and the court entered a default against her in August of 2002. Defendant Martinez filed a motion to set aside the default asserting that she had two meritorious defenses in that Hall did not have her permission to drive her vehicle and that the statute of limitations had expired as to any claim against her. As to good cause, she said that her insurance coverage through Frederick, compounded with the involvement

of several attorneys, initially led her to avoid the case. In April 2003, the trial court granted defendant Martinez's motion to set aside the default. Plaintiff now argues on appeal that the trial court erred in setting aside this default.

In mid-June of 2003, defendant Martinez filed a witness list and an exhibit list, but inadvertently failed to file an answer. In July of 2003, plaintiff filed a notice of entry of default. On November 3, 2003, the parties agreed that Todd Frederick would be dismissed from the lawsuit. On November 5, 2003, plaintiff filed a motion for entry of default and defendant filed objections. The court declined to enter a default based on the lack of an answer, where defense counsel "simply goofed" in not filing one. In addition, defendant had filed her answer before plaintiff's motion for entry of default. On appeal, plaintiff argues that the trial court erred in declining to enter a default judgment. Plaintiff also appeals the January 8, 2004 trial court order which granted defendant Martinez's motion for summary disposition.

On January 28, 2004, defendants Martinez and Frederick filed a motion for sanctions and costs. The trial court awarded both defendants $13,335.33 in sanctions and costs to be paid by plaintiff and plaintiff's attorneys to defendants' insurer. Plaintiff now argues on appeal that the trial court erred in granting this motion because Frederick was not entitled to costs as he had been dismissed from the lawsuit in November 2003.

II. DUTY TO DEFEND

Farmers asserts the trial court erred in finding it had a duty to defend Joseph Hall until the trial court concluded that he was driving without permission, because Farmers' own investigation had arrived at the same conclusion before any costs were incurred. We disagree.

A. Standard of Review

We review a trial court's ruling on a motion for summary disposition de novo. *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Interpretation and construction of insurance contracts are also questions of law, which this Court reviews de novo. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004).

B. Analysis

The Farmers policy states;

> We will pay damages for which any insured person is legally liable because of bodily injury to any person and property damage arising out of the ownership, maintenance or use of a private passenger car, a utility car, or a utility trailer.
>
> We will defend any claim or suit asking for these damages.

The plain language of the Farmers insurance policy also excludes coverage for any person who uses the vehicle without having sufficient reason to believe that the use is with the permission of the owner. The first-amended complaint alleges that Joseph Hall operated the vehicle with the implied consent of Carol Martinez. In her October 2002 deposition, Carol Martinez unequivocally stated that she never gave her 14-year-old son Matthew permission to drive her

car, nor did she ever suspect he would take the car without her permission because she trusted him and he was very mature and had never been in trouble before. In his November 1998 sworn statement, Joseph Hall acknowledged that he believed that Matthew Martinez had taken his mother's car without her permission.

An insurance company will have a duty to defend its insured "if the allegations of the underlying suit arguably fall within the coverage of the policy." *Royce v Citizens Ins Co,* 219 Mich App 537, 543; 557 NW2d 144 (1996). An insurer's duty to defend is broader than its duty to indemnify. *Busch v Holmes,* 256 Mich App 4, 9; 662 NW2d 64 (2003). The duty to defend arises from the language of the insurance contract. *Michigan Education Employees Mut Ins Co v Turow*, 242 Mich App 112, 117; 617 NW2d 725 (2000). In determining if there is a duty to defend, courts are guided by established principles of contract construction. *McKusick v Travelers Indemnity Co,* 246 Mich App 329, 332; 632 NW2d 525 (2001).

Courts have described the duty to defend as follows:

> The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even *arguably* come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. [*Protective National Ins Co of Omaha v Woodhaven,* 438 Mich 154, 159; 476 NW2d 374 (1991), quoting *Detroit Edison Co v Michigan Mut Ins Co,* 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (emphasis in *Detroit Edison;* citations omitted).]

Here, the complaint alleged that Joseph Hall had the implied permission of Carol Martinez to operate the vehicle. This is a theory of liability which the Farmers policy arguably covers. In *Polkow v Citizens Ins Co of America,* 438 Mich 174, 180; 476 NW2d 382 (1991), a case concerning an insurance company's duty to defend in a pollution suit, our Supreme Court stated:

> Fairness requires that there be a duty to defend at least until there is sufficient factual development to determine what caused the pollution so that a determination can be made regarding whether the discharge was sudden and accidental. Until that time, the allegations must be seen as "arguably" within the comprehensive liability policy, resulting in a duty to defend.

Farmers argues that this language means that "sufficient factual development" need not be determined by the trial court, but may be resolved by the insurance company. However, the language in the contract states that Farmers will "defend any claim or suit asking for these damages." In *Guerdon Industries, Inc v Fidelity & Casualty Company of New York,* 371 Mich

12; 123 NW2d 143 (1963), our Supreme Court stated, "[i]t is settled that the insurer's duty to defend the insured is measured by the allegation in plaintiff's pleading. The duty to defend does not depend upon insurer's liability to pay."

In *Zurich Ins Co v Rombough*, 19 Mich App 606, 612; 173 NW2d 221 (1969), a party brought a negligence action against the defendant as a result of a car accident. The plaintiff, the defendant's insurance company, argued that it did not have any duty to defend the defendant in the underlying suit because the defendant was operating the vehicle while hauling a trailer as a part of a business. The policy carried an endorsement which provided the policy did not apply while the automobile or any attached trailer was used to carry property in any business. *Id.* at 611. The *Zurich* Court found the insurance company had a duty to represent the defendant, stating:

> The complaint sets forth allegations which, if true, would subject [the defendant] to liability covered by the policy. It is only by the introduction of extrinsic evidence showing that the driver was hauling a trailer with goods, that coverage might be defeated. The plaintiff has a duty to represent the defendant in the original action. *Id.* at 612.

Here, the complaint sets forth allegations that Joseph Hall was driving with the implied consent of Carol Martinez. If true, those allegations would subject Farmers to liability under the policy. As in *Zurich*, it was only by the introduction of extrinsic evidence that this coverage was defeated. Excluding all extrinsic evidence from the analysis of whether Farmers had a duty to defend, and based solely on the allegations in the complaint, the trial court correctly determined that Farmers was required to defend Joseph Hall until March 8, 2004.

Farmers also argues that it had no duty to defend Joseph Hall because neither he, nor his mother ever specifically requested a defense from Farmers. Ordinarily, an insurer has no duty to defend an insured absent a request to defend. *Celina Ins Co v Citizens Ins Co,* 133 Mich App 655, 662; 349 NW2d 547 (1984). However, it is well established that notice of suit from any source triggers an insurer's duty to defend. *Koski v Allstate Ins Co,* 456 Mich 439, 445; 572 NW2d 636 (1998), citing *Weller v Cummins,* 330 Mich 286, 293; 47 NW2d 612 (1961) ("if the insurance company received adequate and timely information of the accident *or the institution of an action for the recovery of damages it is not prejudiced, regardless of the source of its information"* [emphasis added]). Here, Farmers had notice of the suit as evidenced by its internal investigation. Further, Farmers had notice based upon Auto Club's declaratory judgment action. Thus, the absence of a specific request to defend from Joseph Hall or his mother does not obviate Farmers' duty to defend.

III. SANCTIONS

Plaintiff claims the trial court clearly erred in granting defendants motion for sanctions. We agree.

A. Standard of Review

We review a trial court's decision regarding sanctions based on frivolous pleadings and claims for clear error. *Kitchen v Kitchen,* 465 Mich 654, 661; 641 NW2d 245 (2002). A

decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a firm conviction that a mistake was made. *Id*. at 661-662.

B. Analysis

MCL 600.2591(1) states:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

MCL 600.2591(3) provides:

> "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

The purpose of § 2591 is "to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual [or legal] basis of a claim or defense, not to discipline those whose cases are complex or face an 'uphill fight.'" *Louya v William Beaumont Hosp,* 190 Mich App 151, 163-164; 475 NW2d 434 (1991). "If a party is represented by an attorney, the attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Cvengros v Farm Bureau Ins,* 216 Mich App 261, 266; 548 NW2d 698 (1996). Therefore, "[t]he circumstances existing at the time a case is commenced is of critical importance in determining if a lawsuit has a basis in fact or law." *Meagher v Wayne State Univ,* 222 Mich App 700, 727; 565 NW2d 401 (1997).

Defendant argued that plaintiff filed a frivolous action because he had no reasonable basis to believe that the facts underlying that party's legal position were in fact true, and that the legal position was devoid of arguable legal merit.

Plaintiff argues that at the time plaintiff filed his complaint, he had not yet deposed Carol Martinez. His allegation that Martinez knew or should have known that her son might drive was based on Joseph Hall's statement to police that Matthew Martinez had driven on occasions before the accident. Plaintiff argues that this could indicate that Carol Martinez gave her son permission to drive the car, and Matthew, in turn gave Joseph Hall permission to drive the car. Further, plaintiff notes that there is a common law presumption that the driver of a vehicle is driving with the owner's permission. Thus, at the time the complaint was filed plaintiff did not know whether Carol Martinez would be able to provide evidence to rebut the common law presumption that her vehicle was driven with her permission.

Based on the facts as plaintiff knew them at the time the complaint was filed, the trial court erred in granting defendant sanctions. The known facts could have supported plaintiff's theory that Joseph Hall was driving with the implied consent of Carol Martinez. That Carol Martinez was later able to disprove that theory through her deposition testimony has no bearing on this issue. Thus, we reverse the trial court's award of sanctions based on MCL 600.2591(3)(a)(ii) and (iii).

Plaintiff also claims the trial court erred in granting defendant Frederick sanctions and costs. Although this Court has already determined that sanctions were erroneously awarded, this Court also finds that Frederick was not a proper party to the joint motion for sanctions and costs. The trial court had already dismissed the lawsuit against Frederick without costs before he filed his motion for sanctions. Thus, his motion for sanctions and costs was untimely and must be precluded.

IV. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in granting defendant Martinez's motion for summary disposition. We disagree.

A. Standard of Review

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner, as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *Shepherd Montessori Center Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003).

B. Analysis

In plaintiff's complaint, he alleged that as owner of the vehicle, Carol Martinez was liable for damages suffered by him as a result of the motor vehicle accident caused during the operation of the vehicle by Joseph Hall. Plaintiff relied on MCL 257.401(1) which states:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven

> with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

Here, Joseph Hall was a 14-year-old unlicensed driver unrelated to Carol Martinez. Nonetheless, our Supreme Court has stated that "the operation of a motor vehicle by a person who is not a member of the owner's family gives rise to a rebuttable common-law presumption of consent." *Bieszck v Avis Rent-A-Car Sys, Inc*, 459 Mich 9, 18-19; 583 NW2d 691 (1998), citing *Fout v Dietz*, 401 Mich 403, 405; 258 NW2d 53 (1977). The trial court reviewed the evidence and concluded that there was no genuine issue of material fact as to whether Carol Martinez gave her consent, either express or implied to Joseph Hall.

Carol Martinez stated under oath that she had never given her son Matthew permission to drive her car. She had never known him to drive a vehicle before the accident and had no reason to believe that he even knew how to drive. Carol Martinez gave permission to her older son Mark to drive her car on the day of the accident but not Matthew, and not Joseph Hall. Plaintiff presented no evidence that Carol Martinez gave Matthew, or Joseph Hall express consent to use her vehicle.

The only remaining issue is whether Carol Martinez gave implied consent to the use of her vehicle by leaving her keys unattended in her kitchen. This Court addressed a similar situation in *Caradonna v Arpino*, 177 Mich App 486; 442 NW2d 702 (1989). In *Caradonnna*, the plaintiff was injured in a car accident when his car was hit by a car driven by Kenneth Arpino and owned by the defendant. The plaintiff brought suit alleging that the defendant was liable under MCL 257.401 and that the defendant had impliedly consented to Kenneth Arpino's use of his vehicle.

The defendant parked his car at the condominium of his girlfriend Mary Ann Arpino. The defendant gave her the keys and asked her to move the car around the parking lot in his absence in order to make it appear as though the vehicle had been driven. Ms. Arpino kept the keys on a hook in her kitchen. Kenneth Arpino, Ms. Arpino's son, came to visit Ms. Arpino. Ms. Arpino expressly forbid Kenneth from driving the defendant's car. On the date of the accident, Kenneth took the defendant's keys without permission. *Id*. at 487-488.

The *Caradonna* Court relied on *Fout v Dietz,* 75 Mich App 128; 254 NW2d 813 (1977), and determined that the defendant did not give his implied consent. In *Fout*, a friend of the defendant owner took the keys from the defendant's bedroom while he slept, and subsequently had an accident with the defendant's car. The defendant had previously forbidden his friend from driving the car. In affirming this Court's conclusion that the defendant could not be held liable under the owners' liability statute, the Supreme Court held that the common-law presumption of consent of the owner to the driving of the vehicle at the time of the accident was clearly rebutted. *Fout, supra* at 406-407. The *Caradonna* Court stated:

> We are of the opinion that *Fout* controls here. Kenneth Arpino had no permission whatsoever to drive defendant's automobile, and had in fact been expressly forbidden from driving the vehicle by defendant's permittee, Ms. Arpino. The

> trial court apparently believed that, because Ms. Arpino kept the car keys in the kitchen, she impliedly consented to Kenneth's driving defendant's car. We cannot agree. Under that logic, persons would impliedly consent to social guests taking silverware from the dining room table or books from a living room shelf--a proposition with which no reasonable person could agree. Moreover, the court's reasoning suggests that one must affirmatively hide keys in order ever to establish nonconsent, an equally unreasonable proposition. Simply put, keeping keys in a kitchen does not imply consent to take a car, especially when one has been expressly told *not* to take a car. [*Id.* at 489-491].

Joseph Hall stated that Matthew Martinez took the keys because his mother was out of town and that his mother never gave him permission to drive her car. This is supported by Carol Martinez's version of events. Thus, the common-law presumption that Joseph Hall was driving with the consent of Carol Martinez was effectively rebutted by defendants. Further, plaintiff has presented no contradictory evidence that would place Carol Martinez's story in dispute.

Finally, plaintiff urges this Court to find that the trial court erred in granting defendant's motion for summary disposition because defendant was liable under a theory of failure of parental supervision. In his complaint, plaintiff never alleged negligent supervision on the part of Carol Martinez, but rather made this allegation against Pauline Hall. Nonetheless, plaintiff's argument still fails because Joseph Hall was operating the vehicle at the time of the accident and not Matthew Martinez. Carol Martinez has no parental responsibility for Joseph Hall and no duty to supervise a child that is not her own.

In sum, viewing all the facts in a light most favorable to plaintiff, the trial court did not err in granting defendant's motion for summary disposition.

V. DEFAULT JUDGMENT

Plaintiff argues that the trial court abused its discretion when it set aside default judgments against Carol Martinez on two separate occasions. We disagree.

A. Standard of Review

This Court reviews a trial court's decision regarding whether to set aside a default for an abuse of discretion. *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 652-653; 617 NW2d 373 (2000); *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992). Although it has been said that the policy of this state generally favors the meritorious determination of issues and, therefore, encourages that defaults be set aside, *Id.* at 24, it also has been said that the policy of this state generally is against setting aside defaults that have been properly entered. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

This Court reviews a trial court's decision whether to a enter default judgment for an abuse of discretion. *ISB Sales Co v Dave's Cakes,* 258 Mich App 520, 526; 672 NW2d 181 (2003).

B. Analysis

Under MCR 2.603(A)(1), a failure to defend is grounds for default. Broadly speaking, the failure to appear at trial, the failure of the defendant to comply with any order of the court, or the failure of the defending party to take defensive action in the time prescribed by the rules or court order may be deemed a failure to defend within the meaning of this rule. Michigan Court Rules Practice, § 2603.1. The court's power to default a defendant under this provision is co-extensive with the court's power of dismissal as applied to a plaintiff for failure to comply with these rules or any order of court under MCR 2.504(B). Nonetheless, a default for "failure to defend" is the defense version of a dismissal for "want of prosecution" by a plaintiff, and should be entered only under similar extreme circumstances. Michigan Court Rules Practice, § 2603.1.

MCR 2.603(D)(1) provides: "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." As pointed out by our Supreme Court, courts should be cautious not to blur the meritorious defense and the good cause requirements, which are separate. *Alken-Ziegler, supra* at 233.

Thus, defendant must also show good cause, which includes: (1) a substantial defect or irregularity in the proceedings upon which the default was based or (2) a reasonable excuse for failure to comply with the requirements that created the default. *Gavulic, supra* at 24-25. Although *Gavulic* also indicated that good cause also could be demonstrated by a showing that manifest injustice would result if the default were allowed to stand, *id*. at 25, our Supreme Court has rejected "manifest injustice" as satisfying the good cause element. Rather, the Supreme Court said that manifest injustice occurs if a default were to be allowed to stand where a party has satisfied the meritorious defense and good cause requirements. *Alken-Ziegler, supra* at 233-234. When a party puts forth a meritorious defense, the strength of the defense will affect the good cause showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will suffice than if the defense were weaker, to prevent a manifest injustice. *Id.*

Here defendant asserted a potentially meritorious defense that may be absolute if proven. A lesser showing of good cause thus will suffice under the circumstances here. Defendant states that the good cause requirement is satisfied because she relied on independent counsel's advice that Farmers Insurance would arrange for an attorney to represent her. The record supports a finding of good cause.

In her deposition, defendant stated that she was served with the summons and complaint in June of 2002 and she was "shocked." She called attorney Robert Jameson, who was her former neighbor. He recommended attorney Lowry M. Rains. When she met with Rains, he told her that her insurance company would send a lawyer to defend her. She had insured the vehicle through Farmers Insurance, but she admitted she did not notify Farmers of the suit. She "just didn't think of calling [her insurance agent]" because she was not "good at all this legal stuff" and was not sure what to do. On August 28, 2002, Rains sent defendant a letter advising that he did not represent her and encouraging her to retain other counsel.

On November 18, 1998, defendant had given a statement under oath to Farmers Insurance, so Farmers was aware of her status as an insured. Moreover, defendant believed that

Frederick notified Farmers of the instant lawsuit, as Frederick had been served. Further, defendant herself wrote to Farmers in August of 2002, seeking representation.

On September 19, 2002, Farmers counsel William Schulz contacted plaintiff's counsel, asking that he voluntarily set aside the default. Plaintiff's counsel did not respond until February of 2003, and at that point, merely included defendant's letter to Schulz dated the previous August, when she sought representation. Schulz denied receiving defendant's August letter.

The issue therefore is whether defendant's failure to respond to the suit from June to September of 2002 falls within circumstances sufficiently extreme to warrant default. The circumstances here are not sufficient to warrant a default because defendant's counsel Schulz contacted plaintiff's counsel within weeks of the entry of the default and asked that it be set aside. Further, as pointed out by defendant, Schulz and plaintiff's counsel, Morgan, arranged for the deposition of defendant to be taken in October of 2002, after the default was entered. Plaintiff's counsel Morgan then waited until February of 2003 to indicate that he would not sign the stipulation to set aside the default, and defendant filed her motion the following month.

Although defendant's initial failure to respond to the complaint could call for some sanction, the circuit court had the option of assessing costs so that defendant would not remain unpenalized for her failure to timely respond. Under these circumstances, a default would have been an overly harsh consequence for the short delay, particularly where plaintiff proceeded with taking defendant's deposition in the interim.

As indicated, both the common-law and statutory presumptions of consent are rebuttable upon a showing of positive, unequivocal, strong, and credible evidence that the owner did not consent. *Krisher v Duff*, 331 Mich 699, 706; 50 NW2d 332 (1951); *Lahey v Sharp*, 23 Mich App 556, 559; 179 NW2d 195 (1970). Defendant has presented evidence that she did not consent to Joseph Hall's driving of her vehicle. She had no knowledge that Matthew took her vehicle that day or whether he previously had ever taken her vehicle. She had no knowledge that Matthew apparently had given Joseph Hall permission to drive the vehicle. She denied that she would have given Matthew permission to take the vehicle.

Plaintiff did not counter with any evidence to challenge defendant's testimony. Plaintiff's conclusory arguments were insufficient to overcome defendant's deposition. Consequently, defendant stated a defense with potential merit and the trial court did not abuse its discretion in setting aside the default.

With regard to the second default, plaintiff argues that the trial court was bound to enter a default against defendant under MCR 2.603(A)(1), which provides:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

Plaintiff ignores, however, that defendant not only had appeared in this action, she also had filed a motion for summary disposition in May of 2003, which the court denied in June. Defendant also had filed a witness list and an exhibit list. Accordingly, defendant had not failed

to plead or otherwise defend. Therefore, the circuit court was not bound to enter a default against defendant.

Affirmed in part and reversed in part on the issue of sanctions under MCL 600.2591(3). We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Stephen L. Borrello